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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 27, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PATRICK FLEETWOOD and MICHAEL FLEETWOOD, Plaintiffs, v. WASHINGTON STATE UNIVERSITY, Defendant.	No. 2:20-CV-00355-SAB ORDER RE: DAN PATTERSON DECLARATION; GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING CASE
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Before the Court is Defendant's Motion for Summary Judgment, ECF No. 32, and the parties' supplemental briefing regarding Dan Patterson's Declaration, ECF Nos. 57, 59. The motion and briefing were considered without oral argument. Plaintiffs are represented by Matthew Crotty. Defendant is represented by Debra Lefing and Brian Baker.

Having considered the briefing and the applicable caselaw, the Court (1) determines that Dan Patterson is a qualified witness sufficient to satisfy Fed. R. Evid. 803(6); (2) grants Defendant's Motion for Summary Judgment; and (3) dismisses the case for lack of subject-matter jurisdiction.

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Factual Background

The following facts are pulled from the parties' Statements of Fact, ECF Nos. 33, 38, 43, and are construed in the light most favorable to Plaintiffs, the non-moving party.

I. Mr. Fleetwood's Contract with ROTC

On January 1, 2016, Plaintiff Patrick Fleetwood (“Mr. Fleetwood”) entered into a contract with the Department of the Army (“the Army”) and the Reserve Officers’ Training Corps (“ROTC”) to participate in the ROTC program at Defendant Washington State University (“WSU”). As part of the contract, the Army agreed to pay Mr. Fleetwood three and a half years of financial assistance for his education, including tuition, school fees, monthly subsistence, and a flat fee for textbooks. In exchange, Mr. Fleetwood agreed to serve up to four years on active duty as a commissioned officer in the Army, if offered the position. In the contract, Mr. Fleetwood also agreed that if he became “disenrolled from the ROTC program for breach of contractual terms or any other disenrollment criteria established now or in the future by Army regulations,” he would “reimburse the United States government through repayment of an amount of money, plus interest, equal to the entire amount of financial assistance . . . paid by the United States from the commencement of the contract to the date of his disenrollment.” The Army states that it paid a total of \$32,617.13 in financial assistance to Mr. Fleetwood from the commencement of the contract to the date of his disenrollment.

II. Initial Sexual Harassment Allegations against Mr. Fleetwood

23 During late November or early December 2018, Mr. Fleetwood, then a
24 fourth-year ROTC cadet, began a sexual relationship with B.K., a first-year ROTC
25 cadet. The relationship ended sometime in December 2018.

On January 18, 2019, two cadets submitted Sworn Statements to ROTC in support of a sexual harassment complaint against Mr. Fleetwood. The first Sworn

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1 Statement was from B.K., who stated that she had “character concerns about Cadet
2 Patrick Fleetwood, specifically regarding his sexist behavior towards women” and
3 alleged that Mr. Fleetwood had improperly retaliated against her after she refused
4 to resume a sexual relationship with him after their break-up. The second Sworn
5 Statement was from Cadet J.S., who also alleged that Mr. Fleetwood had engaged
6 in harassing behavior towards B.K. and stated that he had similar concerns about
7 Mr. Fleetwood’s sexist behavior.

8 These Sworn Statements were submitted to Lieutenant Colonel (“LTC”)
9 Brendan Hobbs, who initiated a counseling session with Mr. Fleetwood on January
10 22, 2019. During the counseling session, LTC Hobbs notified Mr. Fleetwood that
11 he had contacted the campus Title IX coordinator to initiate an investigation into
12 Mr. Fleetwood’s conduct between December 2018 and January 18, 2019. Thus,
13 WSU’s Office of Equal Opportunity (“OEO”) reached out to B.K. about filing a
14 formal Title IX Complaint.

15 III. OEO’s Investigation of the Sexual Harassment Allegations against Mr.
16 Fleetwood

17 The OEO is WSU’s “neutral investigative office for potential violations of
18 Executive Policy 15,” which prohibits discrimination, sexual harassment, and
19 sexual misconduct. At the time of Mr. Fleetwood’s investigation, Executive Policy
20 15 defined sexual harassment as “a form of discrimination based on sex and/or
21 gender.” Specifically, Executive Policy 15 stated that “sexual harassment creates a
22 hostile environment when behavior is sufficiently severe, persistent, or pervasive
23 enough to interfere with an individual’s work or educational performance, or
24 creates an intimidating, hostile, or offensive work or educational environment.”

25 Executive Policy 15 provided examples of conduct that could be found to
26 create a hostile environment, one of which was “sexual conduct that is
27 unwelcome,” such as (1) comments of a sexual nature; (2) sexually explicit

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1 statements, questions, jokes, or anecdotes; (3) unwanted, offensive, and/or
2 uninvited comments about another's physical appearance; (4) display of pictures
3 with sexual content; (5) persistent, unwanted attempts to change a professional
4 relationship to an amorous relationship; (6) subtle propositions for sexual activity
5 or directed propositions of a sexual nature; and/or (7) uninvited letters, e-mails,
6 telephone calls, or other correspondence referring to or depicting sexual activities.

7 According to Daniel Records—who served as a senior coordinator in the
8 OEO in 2019—when someone files a complaint of sexual harassment, the OEO
9 will first perform an intake interview with the complaining party to determine
10 whether an investigation into the complaint is warranted. If the OEO determines
11 that an investigation *is* warranted, the OEO will then issue a formal letter of notice
12 to the accused student, outlining the allegations against them. Mr. Records
13 estimates that the OEO receives approximately 600-700 complaints each year,
14 around 60-70% of which involve sexual harassment or sexual misconduct. Mr.
15 Records also states that, of these 600-700 complaints, approximately 25-30% of
16 the complainants do not want to respond or engage in the OEO process. Finally,
17 Mr. Records states that the OEO probably averages around 60-70 investigations
18 per year.

19 Here, OEO Investigators Nikki Finnestad and Rachel Brooks conducted the
20 intake interview with B.K. on January 24, 2019. Because Ms. Brooks was new in
21 the office at the time, Ms. Finnestad took the lead on the intake interview—
22 however, Ms. Finnestad transferred B.K.'s case over to Ms. Brooks on January
23 28, 2019 because she was leaving the office. Plaintiffs note that Ms. Finnestad has
24 a B.A. in multi-cultural and gender studies; has a background in working with
25 victims of domestic violence and sexual assault; and has worked on the WSU's
26 Presidential Commission on the Status of Women, as well as received awards such
27 as the Washington State Women of the Year Award.

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1 In her deposition, Ms. Brooks stated that both she and Ms. Finnestad made
2 the decision to initiate an investigation into B.K.’s complaint. Ms. Brooks stated
3 that the decision to investigate was based on (1) their determination that, if Mr.
4 Fleetwood was found to have committed the alleged conduct, such conduct would
5 rise to the level of a violation of Executive Policy 15; and (2) B.K.’s willingness
6 and desire to proceed with an investigation. After several exchanges with B.K.
7 regarding what details to include in the formal letter of notice to Mr. Fleetwood,
8 Ms. Brooks hand-delivered the letter to Mr. Fleetwood on January 31, 2019,
9 notifying him of the sexual harassment investigation.

10 From February 6, 2019 to April 19, 2019, Ms. Brooks conducted over a
11 dozen witness interviews, including with B.K. and Mr. Fleetwood. As part of her
12 investigation, Ms. Brooks interviewed numerous witnesses provided by B.K.—
13 however, when Ms. Brooks asked Mr. Fleetwood if he would like to recommend
14 witnesses to interview, he declined, stating it would be “hard to find an unbiased
15 person in the program.”

16 On June 13, 2019, Ms. Brooks issued her OEO Investigation Report, which
17 recommended that WSU find Mr. Fleetwood responsible for violating Executive
18 Policy 15.

19 Plaintiffs allege multiple improprieties regarding Ms. Brooks’ investigation.
20 Specifically, Plaintiffs argue that Ms. Brooks (1) interviewed witnesses about
21 instances of Mr. Fleetwood’s conduct outside the scope of B.K.’s initial complaint,
22 specifically regarding a September 2017 Snapchat video Mr. Fleetwood sent to
23 others which depicted himself having sex; (2) did not inform Mr. Fleetwood of this
24 change in the focus of the investigation; (3) did not tell Mr. Fleetwood that he
25 could refuse to answer any questions and that these refusals would not be held
26 against him; (4) made inconsistent credibility determinations regarding key
27 witnesses (*i.e.*, found that some of a witness’s allegations were unsubstantiated, but
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1 found the witness credible overall); (5) did not recall discussing whether any of
2 Mr. Fleetwood's statements were protected by the First Amendment; (6) told Mr.
3 Fleetwood not to delete any electronic communication or contact any other
4 witnesses, but did not instruct B.K. to do the same; (7) asked Mr. Fleetwood about
5 his prior sexual history, despite testifying that OEO does not take a student's
6 consensual sexual history into consideration when determining responsibility; and
7 (8) when sending the Investigation Report, told B.K. that "should this matter
8 proceed to a formal administrative hearing, your participation is important to that
9 process" and that her "[l]ack of participation may have an impact on the outcome."

10 Plaintiffs also argue that, of the nine cases Ms. Brooks investigated at OEO
11 where a woman accused a man of engaging in sexual harassment, Ms. Brooks
12 found in favor of the woman accuser every time except for one. Similarly,
13 Plaintiffs note that, of the ten cases Ms. Finnestead investigated at OEO where a
14 woman accused a man of engaging in sexual harassment, Ms. Finnestead found in
15 favor of the woman every time except for one. Plaintiffs contrast this against Mr.
16 Records' testimony that, on average, OEO finds no violation of a university policy
17 50-60% of the time in sexual harassment cases.

18 IV. The Center for Community Standards' Finding that Mr. Fleetwood Violated
19 Executive Policy 15

20 Pursuant to Executive Policy 15, after OEO issues its Investigative Report, it
21 forwards its report, witness interviews, and documentary evidence to WSU's
22 Center for Community Standards. The Center for Community Standards is
23 responsible for reviewing the evidence and making the official determination
24 regarding (1) whether a student has violated a university policy; and (2) if so, what
25 sanctions should be imposed.

26 The Center for Community Standards can proceed through one of two
27 adjudication processes. First, the Center for Community Standards can proceed
28

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1 through a Conduct Officer hearing, which is generally a one-hour conversation
2 between the student and a Conduct Officer from WSU. The student is permitted to
3 invite an advisor to their Conduct Officer hearing and consult with them during
4 breaks—however, the advisor is not permitted to speak for the student at the
5 hearing. Attending the hearing is optional for the student. If the student attends,
6 they and the Conduct Officer review the evidence in the record and discuss the
7 reported incident and possible outcomes. If the student does not attend, the
8 Conduct Officer simply makes the decision based on the submitted materials. After
9 the hearing, the Conduct Officer can: (1) find the student not responsible; (2)
10 dismiss the reported incident (*i.e.*, does not find the student responsible or not
11 responsible, but instead allows review of the incident to continue and be re-opened
12 at a later date); (3) determine that more investigation is necessary before a decision
13 can be made; (4) refer the matter to the Conduct Board; or (5) find the student
14 responsible and impose educational or disciplinary sanctions. A Conduct Officer
15 *cannot* impose sanctions such as suspension, expulsion, and/or revocation of
16 degrees or university recognition.

17 Alternatively, the Center for Community Standards can proceed through a
18 Conduct Board hearing, which is a more formal adjudication process. The Conduct
19 Board hearing includes at least five Conduct Board members and generally lasts
20 several hours. The accused student can choose to have a legal representative speak
21 on their behalf at the hearing and can also invite an advisor to consult with during
22 breaks. An accused student at a Conduct Board hearing also has the right to cross
23 examine witnesses. At the end of the hearing, the Conduct Board can: (1) find the
24 student not responsible; (2) dismiss the reported incident; or (3) find the student
25 responsible and impose educational and disciplinary sanctions. In order to find
26 responsibility and impose sanctions, a majority of the Conduct Board must agree,

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unless the sanction involves expulsion or revocation of degrees or university recognition, in which case it requires a supermajority.

Here, upon receiving and reviewing the OEO Investigation Report, the Center for Community Standards notified Mr. Fleetwood that he may have violated Executive Policy 15 and that it would schedule a Conduct Officer hearing (not a formal Conduct Board hearing) to address the allegations against him. Mr. Fleetwood's Conduct Officer hearing was originally scheduled for October 21, 2019, but was postponed to October 29, 2019 at his request. Mr. Fleetwood attended his Conduct Officer hearings on October 29, 2019, and December 5, 2019. Karen Metzner, the Director of the Center for Community Standards, served as Mr. Fleetwood's Conduct Officer.

On December 16, 2019, Ms. Metzner issued a letter notifying Mr. Fleetwood that, after considering all the evidence in Mr. Fleetwood's conduct file and the information he provided, she was finding him responsible for violating Executive Policy 15. Specifically, Ms. Metzner found that Mr. Fleetwood had engaged in sexual harassment by (1) sending unwanted pictures of himself in a towel to other ROTC cadets; (2) sending unwanted sexual videos to ROTC cadets via Snapchat; and (3) making sexual comments about B.K. to other cadets.

As a result of the finding, Mr. Fleetwood was tasked with the following sanctions: (1) creating an action plan; (2) writing a reflection paper on the #metoo movement and community repair; (3) being put on disciplinary probation; (4) enrolling in a state-approved alcohol and drug information school; (4) obeying a no contact directive; and (5) having an enrollment hold on his degree until he completed these other sanctions. At the end of the letter, the Center for Community Centers notified Mr. Fleetwood that he had twenty-one calendar days to appeal the decision to the University Appeals Board.

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1 Plaintiffs also allege multiple improprieties regarding Ms. Metzner's
2 decision. Specifically, Plaintiffs argue that Ms. Metzner (1) could not identify a
3 time where she disagreed with OEO's recommended findings on either
4 responsibility or sanctions; (2) did not give Mr. Fleetwood the opportunity to
5 utilize the Conduct Board process, even though he told her that ROTC might
6 remove him from the program based on the decision of the conduct process; (3)
7 discussed Mr. Fleetwood's case with Ms. Brooks, even though this was outside the
8 norm for a Conduct Officer to discuss ongoing investigations with OEO
9 investigators; (4) had two off-the-record conversations—first with Ms. Brooks on
10 June 13, 2019 (the day Ms. Brooks sent the OEO Investigation Report to the
11 Center for Community Standards), and second with B.K. sometime in late
12 September or early October 2019; and (5) did not investigate or seriously consider
13 the evidence Mr. Fleetwood provided to support his own defense and did not
14 address his concerns regarding the flaws in Ms. Brooks' investigation. Plaintiffs
15 also argue that, of the four cases Ms. Metzner has adjudicated where a woman
16 accused a man of engaging in sexual harassment, Ms. Metzner found in favor of
17 the woman each time.

18 V. The University Appeals Board's Agreement that Mr. Fleetwood Violated
19 Executive Policy 15

20 On January 5, 2020, Mr. Fleetwood appealed the Center for Community
21 Standards' December 16, 2019 finding to WSU's University Appeals Board. In his
22 appeal letter, Mr. Fleetwood noted the many procedural flaws he perceived in his
23 case, such as (1) Ms. Brooks' reliance on witnesses with easily verifiable
24 credibility/bias issues; (2) Ms. Metzner's failure to address the flawed nature of
25 Ms. Brooks' investigation; (3) WSU's failure to provide Mr. Fleetwood with full
26 access to investigation records; (4) the lack of evidence substantiating B.K.'s

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1 allegations; and (5) the addition of evidence, such as the 2017 Snapchat video, that
2 was outside the scope of B.K.'s complaint.

3 On February 12, 2020, the University Appeals Board convened to consider
4 Mr. Fleetwood's appeal. A University Appeals Board is made up of three
5 members, one of which is designated as Chair and is tasked with ensuring the
6 accused student receives a fair and impartial process. Here, Mr. Fleetwood was
7 originally notified that TJ Page, Olivia Shoesmith, and Riley Guttromson would
8 serve on his Appeals Board with TJ Page serving as Chair.

9 When considering an appeal, the University Appeals Board reviews all of
10 the evidence in the Center for Community Standards case file, as well as any
11 appeals materials submitted by the parties. However, the Appeals Board does not
12 hear testimony and does not allow the parties to attend the meeting.

13 On February 21, 2020, the University Appeals Board sent Mr. Fleetwood a
14 letter, notifying him that it was affirming the Center for Community Standards'
15 decision. The University Appeals Board noted that it had considered (1) whether
16 the Conduct Officer's hearing was conducted fairly and in conformity with
17 prescribed procedures; (2) whether the decision was based on substantial
18 information which was sufficient to support a violation of the university policy; (3)
19 whether the sanctions were appropriate, given the violation; and (4) whether there
20 existed any new information sufficient to alter the decision that was not known to
21 the Conduct Officer at the time of the original hearing.

22 However, Plaintiffs once again point out what they perceive to be
23 improprieties in the appeals process. These include (1) the University Appeals
24 Board not providing any specific details or reasoning in their decision letter; (2) the
25 Appeals Board changing the Chair from TJ Page to Olivia Shoesmith without
26 explanation; (3) the Appeals Board not following WSU's Procedural Guidelines
27 for Executive Policy 15 violations, specifically by not including the listed
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1 rationales/documents with their decision letter; and (4) Ms. Metzner not
 2 forwarding Mr. Fleetwood's character witness letters to the Appeals Board.

3 **VI. ROTC's Disenrollment Hearings for Mr. Fleetwood**

4 On July 26, 2019, the Army notified Mr. Fleetwood that it was initiating his
 5 disenrollment from ROTC. The Army told Mr. Fleetwood that he was entitled to a
 6 hearing before an Army Disenrollment Board prior to the Army making a
 7 disenrollment decision—Mr. Fleetwood thus requested a disenrollment hearing.

8 Mr. Fleetwood's disenrollment hearing was originally scheduled for October
 9 11, 2019. The Army told Mr. Fleetwood that the purpose of the hearing was to
 10 determine whether the evidence reasonably established, by a preponderance of the
 11 evidence, the following issues: (1) whether a valid ROTC contract existed between
 12 Mr. Fleetwood and the Army; (2) whether Mr. Fleetwood had breached any of the
 13 terms of the contract and, if so, how; (3) whether Mr. Fleetwood received
 14 advanced educational assistance from the U.S Government in the amount of
 15 \$32,617.63 while enrolled in ROTC, which would constitute a valid debt to the
 16 United States; (4) whether there were grounds for his disenrollment in accordance
 17 with Army Regulation 145-1, paragraph 3-43a(14), *i.e.*, undesirable character as
 18 demonstrated by a violation of WSU Executive Policy 15; (5) whether the U.S.
 19 Government should recoup the amount of indebtedness or instead order repayment
 20 via enlisted active duty; and (6) if enlisted active duty was appropriate, whether
 21 Mr. Fleetwood should repay in whole or incur partial forgiveness for the resulting
 22 debt. The Army also told Mr. Fleetwood that he could submit written statements
 23 and witnesses for the hearing to aid the Disenrollment Board in making its
 24 decision.

25 Mr. Fleetwood requested that his disenrollment hearing be postponed so he
 26 could have more time to review documents and prepare his case. Thus, the Army
 27 moved Mr. Fleetwood's disenrollment hearing to December 9, 2019.

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At the December 9, 2019 disenrollment hearing, the Army Disenrollment Board—which consisted of three appointed commissioned officers—heard testimony from ROTC cadets (including Mr. Fleetwood); reviewed exhibits and sworn statements from witnesses involved in the case; and reviewed other materials from Mr. Fleetwood’s file (character letters submitted on his behalf, awards he had received, and peer evaluation reports from the ROTC). At the hearing, Mr. Fleetwood admitted that he had sent the Snapchat video of himself having sex, as well as a picture of himself shirtless and in a towel to male and female cadets.

On December 17, 2019, the Army Disenrollment Board recommended that Mr. Fleetwood be disenrolled from ROTC for breach of contract. Specifically, the Board stated that this decision was based on Mr. Fleetwood’s undesirable conduct, specifically his sending of explicit photos/videos and showing other cadets naked and inappropriate photos of women.

On August 13, 2020, the Headquarters of the Army notified Mr. Fleetwood that it was disenrolling and discharging him from ROTC pursuant to Army Regulation 145-1. The Headquarters of the Army also notified Mr. Fleetwood that he would be responsible for repaying the \$32,617.63 he had received in educational assistance and denied his request to contribute towards repayment through enlisted active duty.

Procedural History

Plaintiffs Patrick Fleetwood and Michael Fleetwood (Mr. Fleetwood’s father) filed a complaint in the Whitman County Superior Court in March 2020. ECF No. 5 at 6. Plaintiffs alleged that WSU’s Appeals Board decision—affirming the Center for Community Standards’ December 16, 2019 determination that Mr. Fleetwood’s actions violated WSU Executive Policy 15—was a misapplication of the law and was not supported by substantial evidence, thereby violating the

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1 Washington Administrative Procedure Act (“state APA”). *Id.* at 10-21. Plaintiffs
 2 also alleged that WSU’s denial of their public records requests and failure to
 3 provide Mr. Fleetwood access to his investigative file violated the Washington
 4 Public Record Act. *Id.* at 21-23. WSU filed both its Answer and a Motion to
 5 Dismiss Count One of Plaintiff’s Complaint on April 2, 2020. *Id.* at 33, 42.

6 The state court denied WSU’s Motion to Dismiss on May 7, 2020. *Id.* at 94-
 7 95. The state court then issued an Administrative Scheduling Order on May 12,
 8 2020. *Id.* at 96-97. On June 30, 2020, Ms. Metzner filed the certified agency record
 9 with the state court. *Id.* at 111. On July 31, 2020, Plaintiffs filed their Opening
 10 Brief. *Id.* at 448. But on August 19, 2020, Plaintiffs filed a Motion to Amend their
 11 complaint to add additional claims, including First Amendment, Fourteenth
 12 Amendment, Title IX, Washington Law Against Discrimination (“WLAD”) gender
 13 discrimination, and tortious interference with contract claims. *Id.* at 483-488. The
 14 state court granted the Motion to Amend on September 2, 2020. *Id.* at 577. WSU
 15 filed its Response Brief on September 21, 2020, and its Answer to Plaintiffs’
 16 Amended Complaint on October 5, 2020. *Id.* at 612-34, 637. Finally, on October 2,
 17 2020, WSU filed a Notice of Removal of the case to this Court. *Id.* at 667; *see also*
 18 ECF No. 1.

19 On October 26, 2020, Plaintiffs filed a Motion to Remand, primarily on the
 20 grounds of *Younger* abstention. ECF No. 7. On January 21, 2021, the Court denied
 21 the motion to remand the case, stating that *Younger* abstention was not appropriate
 22 because there was no longer an ongoing state proceeding post-removal. ECF No.
 23 11. Thus, on March 5, 2021, Plaintiffs filed a motion requesting that the Court rule
 24 on their pending state APA claim. ECF No. 23. However, on May 19, 2021, after
 25 reviewing the submitted materials, the Court declined to exercise supplemental
 26 jurisdiction and instead remanded the state APA claim back to state court. ECF No.
 27 29.
 28

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 CASE # 13**

1 On September 29, 2021, Judge Gary Libey of the Whitman County Superior
2 Court held a hearing on Plaintiffs' state APA claim. After hearing argument from
3 both parties, Judge Libey found that WSU had violated the Washington
4 Administrative Procedure Act when it found that Mr. Fleetwood had violated
5 Executive Policy 15. First, Judge Libey stated that the University Appeals Board's
6 failure to consider the three character witness letters Mr. Fleetwood submitted to
7 Ms. Metzner was sufficient in and of itself to make WSU's decision arbitrary and
8 capricious. Second, Judge Libey stated that, while he was "not making separate
9 findings of facts, conclusions of law . . . [or] particularly weighing the evidence,"
10 he believed that "Mr. Fleetwood present[ed] a very compelling argument . . . that
11 he did not commit sexual harassment and that he did not commit retaliation, and
12 that even the totality of the circumstances doesn't come up to the definition of
13 sexual harassment under the new EP 15 definition as it is based in the code."
14 Finally, Judge Libey concluded by stating that "although it's a close call," he found
15 that the evidence in the record did not support WSU's decision that Mr. Fleetwood
16 had violated Executive Policy 15.

17 On January 25, 2022, WSU filed the present Motion for Summary Judgment
18 in this Court, seeking to dismiss Plaintiffs' First Amendment, Fourteenth
19 Amendment, Title IX, WLAD gender discrimination, and tortious interference
20 with contract claims. ECF No. 32. Plaintiffs filed their response on February 11,
21 2022, indicating that they were withdrawing their First Amendment and Fourteenth
22 Amendment claims. ECF No. 37.

23 However, on February 11, 2022, Plaintiffs also filed a Motion to Exclude
24 Dan Patterson, who submitted a declaration in support of WSU's Motion for
25 Summary Judgment. ECF No. 41; *see also* ECF No. 36. Specifically, Plaintiffs
26 argued that Mr. Patterson's declaration violated Fed. R. Civ. P. 26 because WSU
27 had not disclosed Mr. Patterson as a witness in its initial disclosures. WSU in
28

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1 response argued that Mr. Patterson was merely a records custodian and thus his
2 nondisclosure was harmless, especially given that Mr. Fleetwood had been given
3 all of the records included in Mr. Patterson's declaration.

4 On March 3, 2022, the Court issued an Order Denying Plaintiffs' Motion to
5 Exclude Dan Patterson. ECF No. 49. However, after holding a hearing with both
6 parties, the Court permitted Plaintiffs' counsel to depose Mr. Patterson prior the
7 Court ruling on WSU's Motion for Summary Judgment. The Court also allowed
8 Plaintiffs to submit any supplemental briefing associated with Mr. Patterson's
9 declaration and deposition. ECF Nos. 50, 53.

10 The parties submitted their supplemental briefing regarding Mr. Patterson on
11 April 25, 2022 and May 3, 2022. ECF Nos. 57, 59. Jury trial in this case is
12 currently scheduled for March 20, 2023. ECF No. 56.

13 **Dan Patterson's Declaration**

14 As a threshold matter, the Court must determine whether Dan Patterson's
15 Declaration, ECF No. 36, can be considered when ruling on WSU's Motion for
16 Summary Judgment.

17 In Mr. Patterson's declaration, he states that he has been the Director of
18 Operations for the 8th ROTC Brigade (US Army Cadet Command) at Joint Base
19 Lewis-McChord, Washington, for 10 years. ECF No. 36. Additionally, Mr.
20 Patterson states that, in this position, he is "responsible for public records released
21 from 8th Brigade, Cadet Command through the disclosure process, including in
22 response to discovery in civil and criminal cases and in response to a subpoena
23 duces tecum. While Cadet Records are maintained at the school location, when
24 requests for official records are received, the school programs provide [him] the
25 requested documents which [he] vet[s] with the Cadet Command Office of the
26 Staff Judge Advocate (Fort Knox, KY), and upon their approval[,] release to the
27 requestor."

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1 Attached to Mr. Patterson's declaration are twelve records: (1) Mr.
2 Fleetwood's ROTC Scholarship Cadet Contract dated January 21, 2016; (2) Mr.
3 Fleetwood's U.S. Army Advanced Education Financial Assistance Record dated
4 July 25, 2019; (3) a memorandum to Mr. Fleetwood from WSU ROTC regarding
5 his Notification of Disenrollment dated July 26, 2019; (4) the Report of Mr.
6 Fleetwood's Disenrollment Proceedings by Board of Officers dated December 9,
7 2019; (5) the Formal Board Findings and Recommendations regarding Mr.
8 Fleetwood's disenrollment dated December 17, 2019; (6) a memorandum to Mr.
9 Fleetwood from the Army regarding his disenrollment from ROTC dated August
10 19, 2020; (7) the Addendum to Part 1 of Mr. Fleetwood's Scholarship Contractual
11 Agreement dated August 19, 2020; (8) a memorandum to Mr. Fleetwood notifying
12 him of the appointment of the Board of Officers for his disenrollment hearing
13 dated September 17, 2019; (9) a letter from Mr. Fleetwood to LTC Stafford dated
14 October 2, 2019; (10) emails between Mr. Fleetwood and LTC Stafford, the most
15 recent of which is dated October 10, 2019; (11) the Addendum to Part II of Mr.
16 Fleetwood's Cadet Contract dated August 15, 2019; and (12) a memorandum for
17 Institutional Representative Donald Holbrook regarding Determination of
18 University Representative – Determination of Suitability for Retention in the Army
19 dated September 18, 2019.

20 Plaintiffs argue that Mr. Patterson is not a custodian of records or an
21 otherwise qualified witness sufficient to satisfy Fed. R. Evid. 803(6) and therefore
22 the records attached to his declaration are inadmissible pursuant to the business
23 record exception to the hearsay rule. WSU in response argues that (1) Mr.
24 Patterson is a qualified witness sufficient to satisfy FRE 803(6); and (2) the records
25 attached to Mr. Patterson's declaration are admissible because they were produced
26 in response to a subpoena.

27 //

28

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING
CASE # 16**

Legal Standard

When ruling on a motion for summary judgment, a district court can only consider admissible evidence. Fed. R. Civ. P. 56(c)(2); *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). Unauthenticated documents and hearsay evidence that do not qualify for an exception are inadmissible and, consequently, may not be considered on summary judgment. *Orr*, 285 F.3d at 773-74, 778.

FRE 803(6) is the business record exception to hearsay. It states that “a record of an act, event, condition, opinion, or diagnosis” is admissible if:

- (A) The record was made at or near the time by—or from information transmitted by—someone with knowledge;
 - (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) Making the record was a regular practice of that activity;
 - (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
 - (E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Here, Plaintiffs do not appear to be disputing that the records attached to Mr. Patterson's declaration satisfy requirements (A) – (C) of 803(6). Instead, Plaintiffs are disputing requirement (D), arguing that Mr. Patterson is not a qualified witness regarding the submitted records.

The Ninth Circuit has stated the role of the FRE 803(6)(D) custodian or qualified witness is to “testify to the methods of keeping the information.” *N.L.R.B. v. First Termite Control Co.*, 646 F.2d 424, 427 (9th Cir. 1981). More specifically, the custodian or qualified witness must have sufficient knowledge of “the manner

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CASE # 17**

1 in which the records are made and kept” such that they can “be subjected to
 2 meaningful cross-examination.” *Id.* Otherwise, “[w]ithout cross-examination on
 3 the keeping of the records, the trier of fact would have no rational basis on which
 4 to evaluate the accuracy of the record, and therefore the trustworthiness of the
 5 evidence.” *Id.*

6 However, the Ninth Circuit has also stated that the phrase “other qualified
 7 witness” has been “broadly interpreted to require only that the witness understand
 8 the record-keeping system,” not necessarily that they be an employee of the
 9 business or someone with knowledge of how the records were made or maintained.
 10 *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990); *ABS Ent., Inc. v. CBS*
 11 *Corp.*, 908 F.3d 405, 426 (9th Cir. 2018). Additionally, “[i]t is unimportant under
 12 Fed. R. Evid. 803(6) that the custodian did not herself record the information or
 13 know who recorded the information.” *United States v. Basey*, 613 F.2d 198, 202
 14 n.1 (9th Cir. 1979).

15 Finally, the Ninth Circuit has insinuated that, if there are other indicia that
 16 the accuracy of the records is not contested (*i.e.*, the party challenging the
 17 admissibility of the records has relied on them outside of litigation), this may
 18 support the admissibility of the records, even if the qualified witness does not have
 19 perfect knowledge of every aspect of the record-keeping system. *See ABS Ent.,*
 20 *Inc.*, 908 F.3d at 426 (“Here, CBS itself relied on the reports to establish its royalty
 21 payments to Sound Exchange in the ordinary course of business CBS has
 22 presented no evidence or argument showing that the Triton Reports were unreliable
 23 or inaccurate.”).

24 Discussion

25 Mr. Patterson is a qualified witness under FRE 803(6)(D) for the records
 26 submitted to his declaration.

27 //

28

**ORDER RE: DAN PATTERSON DECLARATION; GRANTING
 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING
 CASE # 18**

1 First, Mr. Patterson's deposition testimony shows that he has an
2 understanding of the record keeping system used by WSU ROTC and the Army to
3 create and maintain the submitted records. Mr. Patterson testified that the
4 submitted records came from "the ACA system. It's just a reposit . . . It's some
5 type of an Automated Cadet Action system where universities can input, scan them
6 at their level." Patterson Dep., ECF No. 60 at 41:1-7. Additionally, when Mr.
7 Patterson was asked "is it typical for university ROTC to submit documents
8 through that system regarding their cadets?", Mr. Patterson replied "daily." *Id.* at
9 41:14-16.

10 Mr. Patterson's deposition testimony also demonstrates his knowledge
11 regarding the manner in which the records are made and kept. For example, he
12 testified that a cadet's file in the ACA system would consist of "training records,
13 his academic records, the evaluation, counseling records . . . Basically, it's a
14 training file, academic file how you're tracking. Later on it would have their
15 summer camp records and how well they performed at the ROTC summer camp,
16 which is now held at Fort Knox, Kentucky, used to be from Fort Lewis. And then
17 information about their choice, if they were going active duty is they would file
18 what branch it served. Their personnel file." *Id.* at 12:3-14.

19 He also testified that this personnel file containing a cadet's records is
20 created for "[e]very cadet once a contractor" and that—for cadets who were
21 receiving scholarships from ROTC, such as Mr. Fleetwood—"there is a record
22 created on every cadet when they contract because they have to take a physical,
23 their medical records are in there, their contract is in there, their pay records is in
24 there. Again, we are paying them to go to school and so then everything else, once
25 you're done—once you're contracted a copy of your transcripts go in, counseling,
26 those are a personnel file is created." *Id.* at 43:17, 43:22-25, 44:1-3.

27
28 **ORDER RE: DAN PATTERSON DECLARATION; GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING
CASE # 19**

1 Finally, Mr. Patterson testified that any records “being used for a cadet
2 action,” “request for scholarship, request for a leave of absence, a Disenrollment
3 Board” would be put into a cadet’s personnel file in the ACA system. *Id.* at 43:2-7.
4 He estimated that he probably receives “five of these a week – maybe three or four
5 a week” of requests for records from the ACA system for disenrollment actions. *Id.*
6 at 12:17-25.

7 These portions of his deposition testimony demonstrate that Mr. Patterson
8 has sufficient knowledge of the manner in which the submitted records were made
9 and kept. Thus, the Court finds that Mr. Patterson is a qualified witness under FRE
10 803(6)(D) and therefore will consider Mr. Patterson’s declaration in ruling on
11 WSU’s Motion for Summary Judgment.¹

12 **WSU’s Motion for Summary Judgment**

13 WSU requests that the Court grant summary judgment in its favor on all of
14 Plaintiffs’ claims except for the Washington Public Record Act claim. Specifically,
15 WSU seeks summary judgment dismissal on Plaintiffs’ Title IX, WLAD gender
16 discrimination, and tortious interference with contract claims. WSU argues that
17 there is no genuine dispute of material fact on these claims because there is a “total
18 lack of evidence that anyone at the University had any gender discriminatory

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20
21¹ The Court concedes that there are portions of Mr. Patterson’s deposition
22 testimony which show his less-than-perfect understanding of all aspects of the
23 record-keeping system. However, based on the Ninth Circuit’s broad interpretation
24 of who constitutes a qualified witness under FRE 803(6)(D), Mr. Patterson has
25 demonstrated sufficient knowledge to cross the threshold. Moreover, Plaintiffs are
26 not substantially challenging the accuracy of records submitted as part of Mr.
27 Patterson’s declaration.
28

**ORDER RE: DAN PATTERSON DECLARATION; GRANTING
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; DISMISSING
CASE # 20**

1 animus against him and that the University did not interfere with Fleetwood's
 2 ROTC contract with the Army." ECF No. 32 at 2-3.

3 Plaintiffs in response argue that there are disputes of material fact,
 4 specifically regarding (1) whether WSU's decision to find Mr. Fleetwood
 5 responsible for violating Executive Policy 15 was an erroneous outcome; (2)
 6 whether this erroneous outcome was due to gender bias in WSU's student conduct
 7 process; (3) whether WSU engaged in disparate treatment based on gender bias;
 8 and (4) whether WSU's decision to initiate the student conduct process was based
 9 on gender bias. ECF No. 37.

10 Legal Standard

11 Summary judgment is appropriate "if the movant shows that there is no
 12 genuine dispute as to any material fact and the movant is entitled to judgment as a
 13 matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless
 14 there is sufficient evidence favoring the non-moving party for a jury to return a
 15 verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
 16 (1986). The moving party has the initial burden of showing the absence of a
 17 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
 18 If the moving party meets its initial burden, the non-moving party must go beyond
 19 the pleadings and "set forth specific facts showing that there is a genuine issue for
 20 trial." *Anderson*, 477 U.S. at 248.

21 In addition to showing there are no questions of material fact, the moving
 22 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
23 Wash. Law Sch., 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
 24 to judgment as a matter of law when the non-moving party fails to make a
 25 sufficient showing on an essential element of a claim on which the non-moving
 26 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party

27
 28 **ORDER RE: DAN PATTERSON DECLARATION; GRANTING
 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING
 CASE # 21**

1 cannot rely on conclusory allegations alone to create an issue of material fact.

2 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

3 When considering a motion for summary judgment, a court may neither
 4 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
 5 is to be believed, and all justifiable inferences are to be drawn in his favor.”

6 *Anderson*, 477 U.S. at 255.

7 Discussion

8 1. *Title IX claim*

9 WSU requests that the Court grant summary judgment in its favor and
 10 dismiss Plaintiffs’ Title IX claim. Specifically, WSU argues that Plaintiffs have not
 11 created a genuine dispute of material fact regarding whether WSU discriminated
 12 against Mr. Fleetwood on the basis of his gender.

13 Plaintiffs in response that there is a genuine dispute of material fact
 14 regarding whether WSU discriminated against Mr. Fleetwood on the basis of his
 15 gender, specifically as evidenced by (1) the Whitman County Superior Court’s
 16 order finding WSU’s decision arbitrary and capricious; (2) the statistical evidence
 17 regarding the outcome of sexual harassment investigations conducted by Ms.
 18 Brooks and Ms. Finnestead; (3) the disparate treatment of B.K. and Mr. Fleetwood
 19 during the student conduct process; (4) Ms. Brooks ignoring B.K.’s “gender-
 20 biased” statements and unfounded allegations; and (5) other procedural
 21 irregularities and indications of gender bias on the part of Ms. Brooks and Ms.
 22 Finnestead.

23 To state a Title IX claim, a plaintiff must show that (1) the defendant
 24 educational institution receives federal funding; (2) they were excluded from
 25 participation in, denied the benefits of, or subjected to discrimination under any
 26 education program or activity; and (3) the exclusion/denial/discrimination occurred
 27 on the basis of gender. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 946 (9th
 28

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 DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; DISMISSING
 CASE # 22**

1 Cir. 2020). Title IX bars the imposition of university discipline where gender is a
 2 motivating factor in the decision to discipline. *Id.* (internal quotation and citation
 3 omitted).

4 Previously, the Ninth Circuit had acknowledged the existence of distinct
 5 doctrinal claims under Title IX, such as “erroneous outcome” or “selective
 6 enforcement” claims. However, in 2020, the Ninth Circuit clarified that all Title IX
 7 claims would be analyzed under the same standard: “whether the alleged facts, if
 8 true, raise a plausible inference that the university discriminated against the
 9 plaintiff on the basis of sex.” *Id.* at 947 (internal quotation and citation omitted).

10 The Ninth Circuit also recently clarified that it “construe[s] Title IX’s
 11 protections consistently with those of Title VII.” *Doe v. Snyder*, 28 F.4th 103, 114
 12 (9th Cir. 2022). Thus, the Court applies the same *McDonnell Douglas* standard to
 13 Plaintiffs’ Title IX claim as it would to a motion for summary judgment for a Title
 14 VII claim.

15 Under the *McDonnell Douglas* standard, the plaintiff bears the initial burden
 16 of establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v.*
 17 *Green*, 411 U.S. 792 (1973). Once the plaintiff has done so, the burden shifts to the
 18 defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* If
 19 the employer articulates a legitimate reason, the plaintiff must raise a triable issue
 20 that the employer’s proffered reason is pretext for unlawful discrimination. *Id.*; see
 21 also *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1136 (9th Cir. 2019) (“The
 22 [McDonnell Douglas] framework is a tool to assist plaintiffs at the summary
 23 judgment stage so that they may reach trial.”) (internal quotation and citation
 24 omitted).

25 The Court grants WSU’s motion as to Plaintiffs’ Title IX claim. Plaintiffs
 26 have not created a dispute of material fact regarding (1) whether any of the alleged
 27 procedural flaws in WSU’s student conduct process were related to gender bias;
 28

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 DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; DISMISSING
 CASE # 23**

1 and/or (2) whether any of the actions taken by the individuals involved in Mr.
 2 Fleetwood's student conduct process were motivated by gender bias.

3 Plaintiffs present several categories of evidence which they argue illustrate
 4 WSU's gender bias against Mr. Fleetwood. First, Plaintiffs argue that there is
 5 "statistical evidence of gender bias," specifically that Ms. Brooks, Ms. Finnestead,
 6 and Ms. Metzner almost always find in favor of women in sexual harassment
 7 cases. ECF No. 37 at 6. However, this fact, standing alone, is insufficient to
 8 demonstrate gender bias. Additionally, Plaintiffs have provided no corresponding
 9 statistics about whether Ms. Brooks, Ms. Finnestead, and Ms. Metzner have
 10 refused to find in favor of a male accuser in sexual harassment cases. *See, e.g.,*
 11 *Austin*, 925 F.3d at 1138 ("The student athletes . . . allege that, because the
 12 University disciplines male students for sexual conduct but never female students,
 13 it is biased against men. But this allegedly disparate impact, even assuming it is
 14 true, claims too much. Significantly, the complaint does not claim that any female
 15 University students have been accused of comparable misconduct, and thus fails to
 16 allege that similarly situated students—those accused of sexual misconduct—are
 17 disciplined unequally.").

18 Second, Plaintiffs argue that the disparate treatment of B.K. compared to Mr.
 19 Fleetwood during the student conduct process is evidence of gender bias. ECF No.
 20 37 at 6-11. Specifically, Plaintiffs state that Ms. Brooks (1) told Mr. Fleetwood not
 21 to delete electronic communication or to contact/influence witnesses; and (2)
 22 faulted Mr. Fleetwood for interfering with the student conduct process by reaching
 23 out to witnesses—but conversely, Ms. Brooks did not advise B.K. of the same
 24 things and did not admonish B.K. when she deleted electronic communication or
 25 contacted witnesses. Additionally, Plaintiffs argue that Ms. Brooks (1) highlighted
 26 Mr. Fleetwood's inconsistent answers over the course of the investigation, but
 27 ignored B.K.'s inconsistent/inaccurate allegations; (2) ignored B.K.'s motivations
 28

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 CASE # 24**

1 for making the complaint, as well as her gender-biased statements against men
 2 (*i.e.*, that Mr. Fleetwood was a “male whore who slept with 30 women in a
 3 semester”; that all men are “assholes,” “fuck boys,” “dickheads,” “thirsty,” or
 4 “flexing their testosterone”; and that she was “losing faith in men real quick”); (3)
 5 gave limited weight to statements in support of Mr. Fleetwood’s character; and (4)
 6 allowed B.K. to modify her statements in the original complaint given to Mr.
 7 Fleetwood to be less specific and to contain less direct quotes.

8 Under the *McDonnell Douglas* analysis—and construing the facts in the
 9 light most favorable to Plaintiffs—this evidence of disparate treatment is sufficient
 10 to create a *prima facie* case of gender discrimination. However, the Court still
 11 grants WSU’s motion because (1) WSU has offered a legitimate,
 12 nondiscriminatory reason for finding Mr. Fleetwood responsible for violating
 13 Executive Policy 15; (2) Plaintiffs have not presented any evidence that WSU’s
 14 disciplinary actions were pretext for gender discrimination; and (3) Plaintiffs have
 15 not presented any evidence that any disparate treatment of B.K. compared to Mr.
 16 Fleetwood was motivated by gender bias and/or resulted in an erroneous outcome.

17 First, WSU offered a sufficiently legitimate and nondiscriminatory reason
 18 for its finding that Mr. Fleetwood violated Executive Policy 15—namely, that it
 19 had evidence that Mr. Fleetwood had sent sexual videos and photos to non-
 20 consenting recipients. Such conduct fits squarely into the examples of unwelcome
 21 sexual conduct sufficient to create a hostile environment in Executive Policy 15
 22 (*e.g.*, display of pictures with sexual content; uninvited correspondence depicting
 23 sexual activities).

24 Additionally, Plaintiffs have not presented any evidence that any of the
 25 flaws in Ms. Brooks’ investigative practices were motivated by gender bias or that
 26 WSU’s decision to find Mr. Fleetwood responsible for violating Executive Policy
 27 15—which only happened after *two more levels* of review by the Center for
 28

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 CASE # 25**

1 Community Standards and the University Appeals Board—was pretext for gender
 2 discrimination. *See Austin*, 925 F.3d at 1138 (“[T]he student athletes do not
 3 articulate any basis to discern that the administration or outcomes of the
 4 disciplinary proceedings were flawed due to the student athletes’ sex. Even if the
 5 outcome of the administrative conference procedure was erroneous, the complaint
 6 is missing any factual allegations that show that sex discrimination was the source
 7 of any error.”) (internal citation omitted).

8 Finally, the U.S. Supreme Court has stated that, in the context of Title IX,
 9 “courts should refrain from second-guessing the disciplinary decisions made by
 10 school administrators.” *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of*
 11 *Educ.*, 526 U.S. 629, 648 (1999). Thus, the Court concludes that Plaintiffs’
 12 provided examples of disparate treatment between B.K. and Mr. Fleetwood are
 13 insufficient to create a dispute of material fact regarding gender discrimination.

14 Third, Plaintiffs argue that the investigators on Mr. Fleetwood’s student
 15 conduct case were gender biased. For example, Plaintiffs argue that Ms. Finnestead
 16 “has a history of working with female domestic violence victims, served on WSU’s
 17 Vagina Monologues production team, served on WSU’s commission on the status
 18 of women, hosted ‘FEMPowerment’ lunches at WSU” and “bears guilt for
 19 previously blaming a high school friend for being sexually assaulted.” ECF No. 37
 20 at 7. However, these do not constitute examples of gender bias. By making such an
 21 argument, Plaintiffs are essentially taking the position that a person who engages in
 22 advocacy on issues such as domestic violence, feminism/female empowerment,
 23 and sexual assault is inherently biased against men, which the Court staunchly
 24 rejects. Additionally, Plaintiffs’ evidence of gender bias on the part of the
 25 investigators does not rise anywhere near the level of gender discrimination found
 26 in other cases. *See Dominguez-Curry v. Nevada Transp. Dep’t*, 424 F.3d 1027,
 27 1038 (9th Cir. 2005) (finding that a decisionmaker’s sexist comments such as

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 CASE # 26**

1 “women have no business in construction,” “women should only be in subservient
 2 positions,” and “I’m going to hire a guy” were related to the hiring decision
 3 process and that “[w]here a decisionmaker makes a discriminatory remark against
 4 a member of the plaintiff’s class, a reasonable factfinder may conclude that
 5 discriminatory animus played a role in the challenged decision.”).

6 Thus, because Plaintiffs have not raised a “plausible inference that the
 7 university discriminated against him on the basis of gender,” the Court grants
 8 WSU’s motion as to Plaintiffs’ Title IX claim. *Schwake*, 967 F.3d at 947.

9 2. *WLAD gender discrimination claim*

10 Washington courts have largely adopted the *McDonnell Douglas* standard
 11 when evaluating motions for summary judgment on state law discrimination claims
 12 where the plaintiff lacks direct evidence of discriminatory animus. *Hill v. BCTI*
 13 *Income Fund-I*, 144 Wash. 2d 172, 180 (2001) *abrogated on other grounds by*
 14 *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 189 Wash. 2d 516 (2017).
 15 However, Washington courts are still “free to adopt” theories and rationales other
 16 than the *McDonnell Douglas* standard when they “best further the purposes and
 17 mandates of our state statute.” *Id.* (internal quotation and citation omitted).

18 Here, because the Court has already found that Plaintiffs have not created a
 19 dispute of material fact regarding gender discrimination for Plaintiffs’ Title IX
 20 claim, the Court similarly grants WSU’s motion as to Plaintiffs’ WLAD gender
 21 discrimination claim. Even if the Court deviates from the *McDonnell Douglas*
 22 analysis, the Court does not find that adopting any alternate theory or rationale
 23 would further the anti-discriminatory purpose of the WLAD in this case.

24 3. *Tortious interference with contract claim*

25 Lastly, WSU requests that the Court grant summary judgment in its favor on
 26 Plaintiffs’ tortious interference with contract claim. WSU argues that there is no
 27 genuine dispute of material fact regarding whether WSU tortiously interfered with

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 CASE # 27**

1 Mr. Fleetwood's ROTC contract because the Army's decision to disenroll Mr.
 2 Fleetwood was based on its own independent fact-finding hearing, which took
 3 place *prior* to the Center for Community Standards' finding that Mr. Fleetwood
 4 had violated Executive Policy 15.

5 Plaintiffs in response argue that there is a dispute of material fact regarding
 6 tortious interference because Ms. Brooks, Ms. Finnestead, and Ms. Metzner knew
 7 of Mr. Fleetwood's ROTC contract and were aware that the WSU's student
 8 conduct process could have negative consequences for Mr. Fleetwood's
 9 involvement with ROTC. Plaintiffs also argue that, though the Army did hold a
 10 disenrollment hearing for Mr. Fleetwood, the disenrollment process would not
 11 have happened if not for WSU's investigation, which unearthed the evidence
 12 supporting the disenrollment decision (*i.e.*, the 2017 Snapchat video). Finally,
 13 Plaintiffs argue that the fact that the Whitman County Superior Court found that
 14 WSU's disciplinary actions against Mr. Fleetwood were arbitrary and capricious is
 15 sufficient to support that WSU had an improper purpose and/or used improper
 16 means in interfering with Mr. Fleetwood's ROTC contract.

17 In order to prove a claim of tortious interference with a contract, a plaintiff
 18 must show five elements: that (1) a valid contract existed; (2) the defendant had
 19 knowledge of that contract; (3) the defendant intentionally interfered, thereby
 20 inducing/causing a breach or termination of that contract; (4) the defendant
 21 interfered for an improper purpose or used improper means; and (5) the
 22 defendant's interference resulted in damage. *Leingang v. Pierce Cnty. Med.*
Bureau, Inc., 131 Wash. 2d 133, 157 (1997). Intentional interference requires an
 24 improper objective or the use of wrongful means that in fact cause injury to the
 25 person's contractual relationship. *Id.* Interference by improper means includes
 26 interference that is wrongful by reason of a statute or other regulation, or a
 27 recognized rule of common law, or an established standard of trade or profession.

28
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1 *Pleas v. City of Seattle*, 112 Wash. 2d 794, 804 (1989). A party exercising its legal
 2 interests in good faith does not constitute improper interference. *Id.*

3 It appears that the parties are only disputing elements (3) and (4) of
 4 Plaintiffs' tortious interference claim. Thus, the Court will focus its analysis
 5 accordingly.

6 The Court grants WSU's motion as to Plaintiffs' tortious interference with
 7 contract claim. First, Plaintiffs have not created a dispute of material fact regarding
 8 whether WSU intentionally interfered and thereby induced/caused the termination
 9 of Mr. Fleetwood's ROTC contract. It is undisputed that WSU only initiated the
 10 student conduct process after ROTC reached out and requested that the campus
 11 Title IX coordinator investigate Mr. Fleetwood's conduct, which does not comport
 12 with a common-sense understanding of the word "interfere."

13 Additionally, Plaintiffs argue that WSU "induced" ROTC's decision to
 14 disenroll Mr. Fleetwood through the Center for Community Standards' decision to
 15 find Mr. Fleetwood responsible for violating Executive Policy 15. However, the
 16 Center for Community Standards issued its finding that Mr. Fleetwood was
 17 responsible for violating Executive Policy 15 on December 16, 2019. Meanwhile,
 18 the Army held its disenrollment hearing for Mr. Fleetwood on December 9, 2019.
 19 Thus, the Disenrollment Board could not have been "induced" to make its
 20 recommendation based on Ms. Metzner's finding because she had not yet issued it
 21 at the time of Mr. Fleetwood's disenrollment hearing.

22 Plaintiffs have also failed to create a dispute of material fact regarding
 23 whether WSU interfered with Mr. Fleetwood's ROTC contract for an improper
 24 purpose and/or used improper means. For one, OEO only initiated an investigation
 25 after independently reviewing B.K.'s allegations for sufficient plausibility.
 26 Moreover, though Plaintiffs argue that B.K. and/or J.S. had an improper objective
 27 in making a sexual harassment complaint against Mr. Fleetwood, Plaintiffs have
 28

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1 presented no evidence showing that WSU shared in that objective. In fact, Ms.
 2 Brooks testified that she investigated the theory (provided to her by Mr.
 3 Fleetwood) that B.K. only made the sexual harassment allegations as part of some
 4 “collaborative collusion” against him, but testified that she did not find much
 5 evidence to support this theory. ECF No. 40, Exhibit C, Brooks Dep. 118:8-24.

6 Finally, Mr. Fleetwood concedes that, at his Army disenrollment hearing, he
 7 testified and admitted to sending the 2017 Snapchat video as well as other explicit
 8 photos. Accordingly, in the Army’s Formal Board Findings and Recommendations
 9 issued on December 17, 2019, after Mr. Fleetwood’s disenrollment hearing, the
 10 Disenrollment Board stated that its reason for recommending Mr. Fleetwood’s
 11 disenrollment was because of Mr. Fleetwood “sending out . . . explicit videos and
 12 showing other Cadets naked and inappropriate photos of women,” which “is not
 13 something a Cadet of Character would do and is not in compliance with the Army
 14 Values.” ECF No. 36, Exhibit 5. This is sufficient to show that the Army’s
 15 disenrollment decision was independent of WSU’s student conduct process.

16 Therefore, because the evidence in the record shows that WSU did not
 17 intentionally interfere with Mr. Fleetwood’s ROTC contract and that ROTC
 18 engaged in its own independent disenrollment hearing before deciding to remove
 19 Mr. Fleetwood from the ROTC program the Court grants WSU’s motion as to
 20 Plaintiffs’ tortious interference claim.

21 **Lack of Federal Subject-Matter Jurisdiction**

22 Now that the Court has granted summary judgment in favor of Defendant on
 23 Plaintiffs’ Title IX, WLAD, and tortious interference with contract claims, the only
 24 remaining claim in the case is Plaintiffs’ Washington Public Record Act claim.

25 However, Defendant removed this case to federal court based on (1) federal
 26 question jurisdiction pursuant to 28 U.S.C. § 1331; and (2) civil rights jurisdiction
 27 pursuant to 28 U.S.C. § 1343. ECF No. 1 at 2 (“This is a civil action of which this
 28

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1 court has original jurisdiction under 28 U.S.C. § 1331 and § 1343.”). Now that the
2 Court has resolved Plaintiffs’ Title IX claim, the Court no longer has federal
3 subject-matter jurisdiction under either basis. Thus, the Court dismisses the action
4 for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *see also California*
5 *Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974).

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Defendant’s Motion for Summary Judgment, ECF No. 32, is
8 **GRANTED.**

9 2. The Clerk’s Office is directed to enter judgment in favor of
10 Defendant.

11 3. The above-captioned case is **DISMISSED** without prejudice.

12 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
13 Order, provide copies to counsel, and **close** the file.

14 **DATED** this 27th day of June 2022.



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18 Stanley A. Bastian

19 Stanley A. Bastian
20 Chief United States District Judge
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**ORDER RE: DAN PATTERSON DECLARATION; GRANTING
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; DISMISSING
CASE # 31**